



WILMER CUTLER PICKERING HALE AND DORR LLP

Arbitrators' Power to Adapt Contract Price

Marija Šćekić

Senior Associate, Wilmer Cutler Pickering Hale and Dorr LLP

I. Remedial Power of Arbitrators

- Defined by the parties' arbitration agreement and any underlying agreement
 - Arbitration agreements are often silent on the scope of remedies available to tribunals
 - But, parties sometimes include specific clauses to limit the remedial powers of arbitrators, e.g.:
 - “The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.”
 - “The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute.”
 - “Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.”

I. Remedial Power of Arbitrators

- The scope of remedial authority is determined by the applicable law
- Choice of law issues:
 - Law of the seat (or the procedural law of the arbitration, if chosen) – arguably the better choice when determining issues of arbitrators' authority and jurisdiction
 - Substantive law – arguably the better choice when determining issues of substantive standard for granting relief, quantum, and character of relief
- Limitations to remedial powers of arbitrators: the *ultra petita* doctrine

II. Basis for Contract Modification

- The applicable procedural law
 - E.g. Dutch Arbitration Act 1996, Article 1020(4)(c)
- The applicable substantive law
 - E.g. the doctrine of *rebus sic stantibus*
- Hardship clauses
- Agreement that the arbitrators can decide *ex aequo et bono* / *as amicable compositeur*
- Specific contractual provisions (e.g. gas price review clauses)

III. Gas Price Reviews

- Long-term gas sales and purchase agreements (duration 10 – 30 years)
- These agreements usually have a mechanism that allows the parties to periodically revise the contract price formula
- Price review / price revision / price adjustment / price reopener clauses
 - Permit revision of the contract price formula in defined circumstances – by agreement of the parties or through arbitration (if the parties are unable to agree)
 - Set out the procedure by which either party may seek to revise the contract price provisions in view of changes in circumstances

III. Gas Price Reviews – Arbitrators’ Powers

- The language of the price review clause
 - What is the permissible scope of revision?
 - What (if any) limitations are there?
- Discretion within the scope of the request for a price revision?
 - Can arbitrators order a smaller/larger price revision than requested?
 - Can arbitrators revise the price in the way that neither party has requested?
- Should other provisions of the contract be taken into account in determining the adjustment of the contract price?
- Does the proposed revision restore the parties’ original bargain?

III. Gas Price Reviews – Atlantic LNG

C. Authority of the Tribunal

20. A price reopener proceeding imposes on the Tribunal obligations that are broader than a traditional arbitration proceeding because the Tribunal is instructed to make commercial decisions based on very general standards and criteria. The Tribunal is required not just to determine whether there is a basis to reopen the price, but to actually decide what the new price should be – in effect revising a key provision of the Contract. Article 8.5(f) expressly requires the Tribunal’s decision to be “in accordance with the criteria set out in sub-Articles (b) [REDACTED] and (c) [reasonable rate of return for GNA] above.” In addition, the Tribunal believes that its decision must give effect to all of the guidance contained in Article 8.5, including sub-Articles (a), (d), (e), (g), and (h). In particular, both parties have acknowledged that any new price should satisfy the “fair and equitable” standard contained in Article 8.5(a). Finally, the Tribunal believes that it should honor the original intent of the parties in 1995, to the extent that such intent can be deduced from the language chosen at that time, as clarified during the hearings.
21. The Tribunal interprets Article 8.5(f) as authorizing it to revise the price provisions of Article 8, but does not believe that it is empowered to revise any of the other provisions of the Contract. Implicit in this limited approach to this dispute is the obligation to ensure that any revision to the pricing mechanism would not have significant adverse implications under any of the other provisions of the Contract, including the future operation of Article 8.5 itself.

III. Gas Price Reviews – Atlantic LNG

- The Tribunal revised the price formula in the way that neither party sought
- Atlantic sought to set aside the award in New York, arguing that the Tribunal acted in excess of its authority, acted against public policy, and violated Atlantic's due process rights
- Atlantic's motion to set aside was denied – the court, *inter alia*, held:

“[T]he Tribunal was specifically charged with the duty to revise the pricing scheme once it determined that the contractual preconditions were met. The Tribunal having made that determination, Article 8.5(a) required it to ***reach ‘a fair and equitable revision’ of the contract price***. Neither this standard nor any other contractual provision set a structural limitation on permissible price revisions. Indeed, Atlantic's submissions to the Tribunal ***acknowledged the Tribunal's broad authority*** in this regard.”